EASTERN PROPERTIES SDN BHD A

v.

HAMPSTEAD CORPORATION SDN BHD

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-478-1998]
22 OCTOBER 2007 C

CONTRACT: *Interest - Overdue payment - Rescission agreement - Joint venture - Fiduciary duty - Principles of equity*

CONTRACT: *Joint venture - Fiduciary duty - Rescission agreement - Claim for interest due to overdue payment - Principles of equity* D

On 28 February 1981, one Eastern Properties ('Eastern') and one Hampstead Corporation ('Hampstead') entered into a joint venture agreement to develop five parcels of land ('said lands') owned by the former. Hampstead was to develop the said lands, E which were charged to a bank ('UMBC') to whom Eastern owed RM1.2 million. Hampstead, in performance of its obligations under the joint venture agreement, paid off UMBC and redeemed the said lands. It did this by getting the said lands transferred to it and then charging them to UMBC to borrow RM1.2 million from F UMBC. It then used the RM1.2 million to pay off Eastern's debt to UMBC. About two years later, the parties decided to call off the joint venture and, on 17 February 1983, they entered into a Rescission Agreement under the terms of which: (i) Hampstead was to pay Eastern RM75,000; (ii) Eastern was to pay G Hampstead RM1.2 million less the RM75,000 not later than 15 May 1983; and (iii) on Eastern making payment, Hampstead was to deliver valid and registrable memoranda of transfers of the said lands to Eastern. As a result of an action brought by one Emtex Properties against Eastern and Hampstead in relation to the said H lands, Eastern and Hampstead delivered a counterclaim against each other. The learned judge held that Eastern had not paid Hampstead by 15 May 1983 and that payment was only made on 24 April 1990. He, therefore, entered judgment for Hampstead on its claim against Eastern for interest during the period of delay in I payment. Eastern appealed, relying on the fact that Hampstead stood in a fiduciary position towards it by virtue of their being

joint venturers and, hence, it was a breach of the duty of good faith owed by Hampstead not to have acted on Eastern's notification that it was ready, willing and able to pay the sum due under the Rescission Agreement.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is settled law that joint venturers owe a fiduciary duty to each other: just as partners do. *Meinhard v. Salmon* (foll); *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* (foll); *O'Neill v. Phillips* (foll). In the present instance, looking at the case as a whole, there was nothing in the conduct of Hampstead on the basis of which equity would be inclined to interfere. There was nothing that Hampstead did or omitted to do that demonstrated an absence of good faith on its part. Hampstead neither insisted on its strict legal rights to inflict harm upon Eastern nor did it refuse to hand over the relevant memoranda of transfers at the appropriate time. Eastern's case appeared to be that Hampstead acted unconscionably by delaying the redemption of the charges, but the evidence did not support that charge of inequitable conduct. On the contrary, Eastern's letter dated 9 October 1986 referred to by the learned judge made it plain that Eastern was not in a position to meet its obligations under the Rescission Agreement. Although it is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion, there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. Applying the maxim of "He who comes to equity must come with clean hands" to the present case, it would be contrary to all principles of equity to allow the litigant here to succeed since it was guilty of a failure to abide by the promise it had made. (para 10, 11, 12, 13, 14 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Pada 28 Februari 1981, dua syarikat yang bernama Eastern Properties ('Eastern') dan Hampstead Corporation ('Hampstead') telah memeterai satu perjanjian usahasama untuk membangunkan lima keping tanah ('tanah-tanah tersebut') yang dimiliki pihak terdahulu. Hampstead akan membangunkan tanah-tanah tersebut,

yang digadai kepada kepada sebuah bank ('UMBC') kepada siapa Eastern berhutang sebanyak RM1.2 juta. Dalam melaksanakan obligasi-obligasinya di bawah perjanjian usahasama, Hampstead telah membayar balik UMBC dan menebus tanah-tanah tersebut. Hampstead melakukan itu dengan memindahmilik tanah-tanah tersebut kepada dirinya dan kemudian menggadaikannya kepada UMBC untuk meminjam RM1.2 juta dari UMBC. Ia kemudian menggunakan RM1.2 juta tersebut bagi membayar hutang Eastern kepada UMBC. Kira-kira dua tahun kemudian, pihak-pihak memutuskan untuk menamatkan usahasama, dan pada 17 Februari 1983, mereka memeterai Perjanjian Penamatan yang memperuntukkan bahawa: (i) Hampstead akan membayar Eastern RM75,000; (ii) Eastern akan membayar Hampstead RM1.2 juta kurang RM75,000 selewat-lewatnya pada 15 Mei 1983; dan (iii) atas pembayaran oleh Eastern, Hampstead akan menyerahkan memoranda pindahmilik yang sah dan boleh didaftar tanah-tanah tersebut kepada Eastern. Bagaimanapun, ekoran satu tindakan yang difailkan oleh syarikat yang dipanggil Emtex Properties terhadap Eastern dan Hampstead berkaitan dengan tanah-tanah tersebut, Eastern dan Hampstead saling tuntut menuntut di antara sesama mereka. Yang arif hakim memutuskan bahawa Eastern gagal membayar Hampstead pada 15 Mei 1983 dan bahawa pembayaran hanya dibuat pada 24 April 1990. Beliau dengan itu memberikan penghakiman kepada Hampstead atas tuntutan faedahnya terhadap Eastern atas kelewatan Eastern membuat pembayara tersebut. Eastern merayu dan berhujah bahawa Hampstead berada dalam kedudukan fidusiari dengannya disebabkan oleh perhubungan mereka sebagai rakan seusahasama, dan oleh kerana itu Hampstead telah melakukan keingkaran terhadap tanggungjawabnya untuk bertindak dengan ikhlas bilamana tidak bertindak atas notifikasi Eastern bahawa ia sentiasa bersedia dan mampu membayar jumlah yang tertunggak di bawah Perjanjian Penamatan.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Sudah menjadi undang-undang mantap bahawa rakan seusahasama memikul tanggungjawab fidusiari terhadap satu sama lain: ini sama seperti rakan kongsi. *Meinhard v. Salmon* (diikuti); *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* (diikuti); *O'Neill v. Phillips* (diikuti). Dalam kes semasa, melihat kepada keseluruhan kes, tiada apapun pada tingkah laku Hampstead yang mewajarkan campurtangan ekuiti. Tiada apapun yang

dilakukan atau yang gagal dilakukan oleh Hampstead yang menunjukkan ketiadaan keikhlasan di pihaknya. Hampstead tidak cuba menjejaskan kepentingan Eastern dengan cara menuntut secara ketat haknya di sisi undang-undang, dan tidak juga enggan menyerahkan memoranda pindahmilik berkenaan di waktunya yang sesuai. Kes Eastern nampaknya adalah bahawa Hampstead telah bertindak dengan tidak bertimbangrasa apabila melengah-lengahkan penebusan gadaian, tetapi dakwaan tersebut tidak disokong oleh keterangan. Sebaliknya, surat Eastern bertarikh 9 October 1986 yang dirujuk oleh yang arif hakim menunjukkan bahawa Eastern tidak berada dalam keadaan untuk menunaikan obligasi-obligasinya di bawah Perjanjian Penamatan. Walaupun tidak dinafikan bahawa doktrin ekuiti tidak harus dikendali secara ketat, beberapa kes penting, melalui perisytiharan-perisytiharan mereka atas persoalan ini, telah menyerapkan jalur-jalur asas tertentu ke dalam intisari doktrin ekuiti. Menggunapakai maxim "orang yang datang kepada ekuti hendaklah datang dengan tangan yang bersih" kepada kes di sini, adalah bertentangan dengan semua prinsip ekuiti untuk membenarkan litigan di sini berjaya, kerana ia sendiri bersalah apabila tidak mematuhi janji yang dibuatnya.

Case(s) referred to:

Meinhard v. Salmon [1928] 249 NY 456 ***(foll)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(foll)***

O'Neill v. Phillips [1999] UKHL 24 ***(foll)***

For the appellant - Ramdas Tikamdas; M/s Siva, Ram & Assoc
For the respondent - Mark Ho; M/s Chellam Wong

[Appeal from High Court, Kuala Lumpur; Suit No: C3-22-331-1989]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This case has some history. Here it is. The plaintiff in the court below is a company called Emtex Properties. Emtex had entered into an agreement with Hampstead Corporation to purchase certain properties. It had paid a deposit. Later, it wanted to recover the deposit. It brought an action against

Eastern Properties and Hampstead. That is because Eastern and Hampstead had entered into a joint venture in respect of the properties in question. Eastern and Hampstead delivered a counterclaim against each other. The trial judge found for Emtex in the original action and entered judgment against Hampstead. He then went on to find for Hampstead on its counterclaim against Eastern. There is no appeal against the orders made in favour of Emtex. The present appeal has been brought by Eastern against the judgment entered in Hampstead's favour.

[2] Now for the facts. On 28 February 1981, Eastern and Hampstead entered into a joint venture agreement to develop five parcels of land owned by the former. Hampstead was to develop the lands. The lands were charged to a bank (I will call it UMBC) to whom Eastern owed RM1.2 million. Hampstead, in performance of its obligations under the joint venture agreement paid off UMBC and redeemed the lands. It did this by getting the lands transferred to it and then charging them to UMBC to borrow RM1.2 million from it. It then used the RM1.2 million to pay off Eastern's debt to UMBC. About two years later the parties decided to call off the joint venture. On 17 February 1983, they entered into a Rescission Agreement under the terms of which:

(i) Hampstead was to pay Eastern RM75,000;

(ii) Eastern was to pay Hampstead RM 1.2 million less the RM75,000 not later than 15 May 1983;

(iii) on Eastern making payment, Hampstead was to deliver valid and registrable memoranda of transfers of the lands in question to Eastern.

[3] There is no doubt that Eastern paid off Hampstead. What became an issue – and remains an issue before us – is whether Eastern paid Hampstead in accordance with cl. 2 of the Rescission agreement. That clause reads:

> 2. The owner hereby covenant that the owner shall as soon as possible but in any event not later than 15 May 1983 arrange to repay to the company the sum of M$1.2 million but less the sum of $75,000.00 payable hereunder to the owner by the company where upon the company shall execute and deliver to the owner a valid and registrable Memorandum of Transfer of the said land

to the owner together with the relevant documents of titles' – For clarification the term 'owner' refers to Eastern Properties and 'company' refers to Hampstead.

[4] The learned judge held that Eastern had not paid Hampstead by 15 May 1983. He held that payment was made only on 24 April 1990. He therefore entered judgment for Hampstead on its claim against Eastern for interest during the period of delay in payment. In doing so the judge relied on Eastern's own letter of 9 October 1986 in which Eastern had (among other things) said this:

> While it is regretted that we have to date failed to observe the provision of the Rescission Agreement, we shall use our best endeavour to arrange for the repayment of the United Malayan Banking Corporation Berhad ('UMBC') loan referred to in the Rescission Agreement no later than 29th day of November, 1987.

[5] Before us learned counsel for Eastern said that his client ought not to be held liable for the interest over the whole period of delay in payment. He accepted that Eastern was liable to pay Hampstead interest for the period 17 February 1983 (the date of the Rescission Agreement) and 15 May 1983 (the date on which payment ought to have been made). He argues, however, that his client is not liable to pay interest until 28 August 1985 which is the date of Hampstead's letter. The essential part of that letter reads as follows:

> We confirm our verbal agreement that the abovementioned term loan together with interest thereon are to be settled as follows:
>
> 1. The entire principle amount of $1.2 Million of the aforesaid term loan is to be fully settled by you. Please write to UMBC to authorise them to debit your account and simultaneously to credit our account with the monies.
>
> 2. The interest on the said term loan being $966,028.36 as at 28 August 1985 will be paid by us on the same day.
>
> 3. You will bear a portion of the interest of $966,028.36, being $319,000.00 (this amount is subject to verification according to UMBC's bank statements) from which you shall deduct the sum of $75,000.00 being the amount that you are to withhold as provided for in the agreement between Hampstead and yourselves dated 17 February 1983, thus leaving a amount of $244,000.00 due from you to us as at 28 August 1985.

4. Any further interest from 28 August 1985 up to the date of payment of (1) above shall be shared between Hampstead and Eastern in the following ration as calculated below:

Total amount outstanding

As at 28 August 1985		$2,166,028.36
Less: Eastern Properties portion		
Principal	1,200,000.00	
Interest	319,000.00	$1,519,000.00
		$ 647,028.36

The sharing ratio is therefore:

Hampstead	647,028.00
	2,166,028.00
Eastern	1,519,000.00
	2,166,028.00

As UMBC will require a new charge over the said land therefore simultaneous with the presentation of the UMNC charge (for Eastern Properties account) our solicitors, Abdul Aziz, Ong & Co. shall present the following:

i. the discharge of the UMBC charge (for Hampstead's account).

ii. the memorandum of transfer of the land into your name.

For the purpose of expediency, we will try to arrange for our solicitors to attend the presentation of the UMBC charge failing which we will instruct our solicitors to attend as above.

i. attend to your execution of the memorandum of transfer.

ii. undertake to pay us no later than 31 December 1985 your portion of interest, however, subject to registration of the said land into your name.

Upon receipt of your solicitor's letter of undertaking we will arrange to pay the interest $955,028.36 as stated in (2) above.

[6] Learned counsel also drew our attention to Hampstead's pleaded case in which it claimed:

A (vi) the sum of M$290,375.00 being Eastern Properties' portion of the accumulated interest on Hampstead's loan as at 28 August 1985;

[7] It is learned counsel's submission that Eastern's liability to pay interest ceased as at 17 November 1983. He says that his client was ready, willing and able to pay the debt as at that date and Hampstead was aware of that fact. According to him, Eastern obtained a loan of RM1.2 million from UMBC and had written to Hampstead over a period of about 12 months of its ability to pay the sum due under the Rescission Agreement. As a result of Hampstead's dilatoriness, Eastern had had to pay a sum of RM2.2 million to UMBC in 1990 to obtain a discharge of the charges created by Hampstead over the lands in question.

[8] Mr. Ho of counsel for Hampstead was able to demonstrate that the correspondence relied on by Eastern did not span the entire period relied on by it. It is clear from the record provided to us that some of the letters pre-date the Rescission Agreement and could not possibly have anything whatsoever to do with Eastern's ability to pay the sum due.

[9] In response, Eastern relies on the fact that Hampstead stood in a fiduciary position towards it by virtue of their being joint venturers. Hence, it was a breach of the duty of good faith owed by Hampstead not to have acted on Eastern's notification that it was ready, willing and able to pay the sum due under the Rescission Agreement. I must confess that this point has caused me much anxiety. But, after careful consideration I am inclined to the view that Eastern must fail in this appeal for the reasons I shall now provide.

[10] It is settled law that joint venturers owe a fiduciary duty to each other: just as partners do. In the words of Cardozo CJ in *Meinhard v. Salmon* [1928] 249 NY 456 at p 464 (a case of joint venturers):

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate.

[11] In *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321, the Supreme Court held that the relationship of parties to a joint venture is fiduciary in nature. The court in that case recognised that the essential element for the working of a fiduciary relationship is that parties act in good faith to each other.

[12] In *O'Neill v. Phillips* [1999] UKHL 24, Lord Hoffmann discussed the intrusion of equitable principles in the regulation of the affairs of a limited company. There are some useful passages in his speech in which he discusses the nature of the duty to act in good faith. I will quote them:

> One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith.
>
> …
>
> An example of such equitable principles in action is *Blisset v. Daniel* [1853] 10 Hare 493 [68 ER 1022] to which Lord Wilberforce referred in In re Westbourne Galleries Ltd. at p. 381. Page-Wood V.C. held that upon the true construction of the articles, two-thirds of the partners could expel a partner by serving a notice upon him without holding any meeting or giving any reason. But he held that the power must be exercised in good faith. He said that 'the literal construction of these articles cannot be enforced' and, after citing from the title 'De Societate' in Justinian's Institutes, went on:
>
> > It must be plain that you can neither exercise a power of this description by dissolving the partnership nor do any other act for purposes contrary to the plain general meaning of the deed, which must be this, that the power is inserted, not for the benefit of any particular parties holding two-thirds of the shares but for the benefit of the whole society and partnership.

[13] Returning to the present instance, I have taken a step back and looked at the case as a whole. Having done so, I am unable to find anything in the conduct of Hampstead on the basis of which equity will be inclined to interfere. What is it that Hampstead did or omitted to do that demonstrates an absence of good faith on its part? The answer is: nothing. Hampstead did not

insist on its strict legal rights to inflict a harm upon Eastern. Neither did it refuse to hand over the relevant memoranda of transfers at the appropriate time. Eastern's case appears to be that Hampstead acted unconscionably by delaying the redemption of the charges. But the evidence does not support that charge of inequitable conduct. On the contrary, Eastern's letter referred to by the learned judge and reproduced earlier in this judgment makes it plain that Eastern was not in a position to meet its obligations under the Rescission Agreement.

[14] It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. But there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. One of these is that a supplicant who prays in aid equitable assistance must himself or herself be not guilty of equitable misconduct. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands. So, a contract breaker cannot successfully invoke the remedy of specific performance. So too, a trespasser may be unable to restrain the true owner of land from denying him access. Likewise, a tenant who is guilty of a breach of a covenant in his lease may be refused equitable relief from forfeiture. These are all but individual illustrations of the basic fabric.

[15] Now apply that to the present case. Here we have a litigant which is guilty of a failure to abide by the promise it had made. It would be contrary to all principles of equity to allow it to succeed.

[16] For the reasons already given, I am in agreement with the conclusions arrived at by the learned judge. I would therefore dismiss this appeal. All the orders of the High Court are affirmed. The appellant (Eastern) must pay the respondent (Hampstead) the costs of this appeal. The deposit in court shall be paid out to the respondent to account of its taxed costs.

[17] My learned brothers Richard Malanjum and Hashim bin Dato' Haji Yusoff, JJCA have seen this judgment in draft and have expressed their agreement with it.